

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

NUTRISHARE, INC., a California
Corporation,

NO. CIV. S-08-1252 WBS EFB

Plaintiff,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION;
MOTION TO DISMISS FOR IMPROPER
VENUE OR, ALTERNATIVELY,
MOTION TO TRANSFER VENUE

v.
BIORX, L.L.C., an Ohio Limited
Liability Company,

Defendant.

/

-----oo0oo-----

Plaintiff Nutrishare, Inc. brought this action alleging trademark infringement and unfair competition stemming from defendant BioRx, L.L.C.'s use of its "NutriThrive" mark. Defendant now moves to dismiss plaintiff's Complaint for a lack of personal jurisdiction and improper venue or, alternatively, transfer the action to another venue.

///

1 I. Factual and Procedural Background

2 Plaintiff, a corporation duly organized and existing
3 under the laws of the State of California with its principal
4 place of business in Elk Grove, California, specializes in the
5 nationwide business of providing products and services related to
6 "total parenteral nutrition" (TPN)¹ directly to consumers in
7 their homes. (Compl. ¶ 1.) Proceeding under its "Nutrishare"
8 designation since 1991, plaintiff formally registered the
9 "Nutrishare" mark in the category of retail pharmacy and mail
10 order services on September 3, 2002. (Id. at ¶ 10.) Throughout
11 plaintiff's commerical existence, the mark has been prominently
12 displayed on its products, letter head, invoices, advertising,
13 and publications--either in standard characters or in conjunction
14 with a logo depicting "Nutrishare" in block letters preceded by
15 the stylized image of a bag and IV catheter. (Id. at ¶ 12.)

16 Defendant, a limited liability company organized and
17 existing under the laws of the State of Ohio with its principal
18 place of business in Cincinnati, Ohio, is a national provider and
19 distributor of specialty pharmaceuticals, medical supplies, and
20 clinical support services. (Id. at ¶ 2; Rielly Decl. ¶ 3.) On
21 November 18, 2007, defendant formally launched its own
22 TPN-related products and services division, designated
23 "NutriThrive." (Compl. ¶ 13.)

24 Based on defendant's use of the "NutriThrive" mark,
25 plaintiff filed its Complaint on June 4, 2008 in the Eastern

26 ¹ TPN is the practice of supplying nutrients
27 intravenously to individuals who suffer from ailments that
28 deteriorate their gastrointestinal system to such a degree that
they can no longer eat and digest foods. (Compl. ¶ 1.)

1 District of California, alleging the following claims: (1)
2 Trademark Infringement--Lanham Act § 31(1), 15 U.S.C. § 1114(1);
3 (2) Common Law Trademark Infringement; (3) Unfair
4 Competition--Lanham Act § 43(a), 15 U.S.C. § 1125(a); and (4)
5 Unfair Competition--California Business and Professions Code §§
6 17200-17210. On July 16, 2008, defendant filed a motion to
7 dismiss the Complaint pursuant to Federal Rule of Civil Procedure
8 12(b)(2) for a lack of personal jurisdiction. Should the court
9 determine personal jurisdiction in California to be proper,
10 defendant moves to dismiss the Complaint for improper venue
11 pursuant to Rule 12(b)(3) or, alternatively, transfer venue to
12 the Southern District of California.

13 II. Discussion

14 A. Motion to Dismiss for Lack of Personal Jurisdiction

15 A plaintiff has the burden of establishing that the
16 court has personal jurisdiction over a defendant. Doe v Unocal
17 Corp., 248 F.3d 915, 922 (9th Cir. 2001). In assessing a
18 plaintiff's showing, the court may consider evidence presented in
19 affidavits as well as other evidence procured during discovery.
20 But when the court acts on the motion without holding a plenary
21 evidentiary hearing, as here, a plaintiff need only make a prima
22 facie showing of jurisdictional facts to withstand the motion to
23 dismiss. Id.; see also Rano v. Sipa Press, Inc., 987 F.2d 580,
24 587 n.3 (9th Cir. 1993) (noting that where the district court
25 "relies solely on affidavits and discovery materials, the
26 plaintiff need only establish a prima facie case of
27 jurisdiction"). When not directly controverted, a plaintiff's
28 version of the facts must be taken as true and conflicts between

1 the facts contained in the parties' affidavits should be resolved
2 in favor of this plaintiff. Doe, 248 F.3d at 922. Once a
3 defendant has contradicted allegations contained in the
4 complaint, however, a plaintiff may not rest on the pleadings,
5 but must present admissible evidence which, if true, would
6 support the exercise of personal jurisdiction. Harris Rutsky &
7 Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122,
8 1129 (9th Cir. 2003).

9 In union with a plaintiff's burden, a federal court may
10 only exercise personal jurisdiction over a defendant when such
11 jurisdiction comports with the law of the state in which the
12 court sits and with the requirements of due process. Lee v City
13 of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001). "California
14 [law] permits the exercise of personal jurisdiction to the full
15 extent permitted by due process." Bancroft & Masters, Inc. v.
16 Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000); see
17 also Cal Civ. Proc. Code § 410.10 ("A court of this state may
18 exercise jurisdiction on any basis not inconsistent with the
19 Constitution of this state or of the United States.").

20 Due process requires a defendant to have certain
21 minimum contacts with the forum state so that permitting the suit
22 would not offend "traditional notions of fair play and
23 substantial justice." Int'l Shoe Co v. Washington, 326 U.S. 310,
24 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940));
25 see also World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297
26 (1980) (holding that the defendant's "conduct and connection with
27 the forum state" must be such that the defendant "should
28 reasonably anticipate being haled into court there"). The nature

1 and quality of the contacts with the forum state necessary to
2 support personal jurisdiction depend upon whether the defendant
3 consents to jurisdiction or, alternatively, whether the plaintiff
4 asserts general or specific personal jurisdiction over the
5 defendant. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316,
6 1320 (9th Cir. 1998).

7 1. Consent to Personal Jurisdiction

8 Recognizing that "there are a 'variety of legal
9 arrangements' by which a litigant may give 'express or implied
10 consent' to the personal jurisdiction" of a state, Burger King
11 Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (citation
12 omitted), plaintiff argues that defendant consented to
13 jurisdiction in California as a matter of law when it registered
14 as a non-resident pharmacy with the California State Board of
15 Pharmacy and appointed an agent for service of process. The
16 Ninth Circuit has not definitively stated whether a foreign
17 company's registration to do business in a state and appointment
18 of an agent for service of process are acts that equal consent to
19 personal jurisdiction in that state. Other courts have decided
20 the issue both ways. Compare Ratliff v. Cooper Labs., Inc., 444
21 F.2d 745, 748 (4th Cir. 1971) (holding that "the application to
22 do business and the appointment of an agent for service . . . is
23 of no special weight in the [jurisdictional] context") with
24 Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir.
25 1990) ("The whole purpose of requiring designation of an agent
26 for service is to make a nonresident suable in the local
27 courts.").

28 This jurisdictional conflict, however, is not entirely

1 applicable to the instant action. Each case that plaintiff
2 relies upon to establish jurisdictional consent--and even the
3 cases that directly controvert its argument--deal with a foreign
4 corporation that had registered to do business within a
5 particular state and had appointed an agent for service in that
6 specific context. Notably, defendant has never registered with
7 the California Secretary of State, as it would be required to do
8 if it were "doing business in" California as contemplated by
9 those cases. See Cal. Corp. Code § 17451(a) ("Before transacting
10 intrastate business in this state, a foreign limited liability
11 company shall register with the Secretary of State."). Rather,
12 defendant has only registered with the California State Board of
13 Pharmacy as it must to do in the event that it, like other
14 nonresident pharmacies subject to California's Pharmacy Law, Cal.
15 Bus. & Prof. Code §§ 4000-4480, chose to ship any controlled
16 substances to consumers in California from outside the state. In
17 doing so, defendant was also required to designate a agent for
18 service of process by section 4112 of the California Business and
19 Professions Code. Cal. Bus. & Prof. Code § 4111(c)(1).²

20

21 ² Additionally, in section 4120(d) of the California
22 Business and Professions Code, the statute declares that "[t]he
23 Legislature, by enacting this section, does not intend a license
24 issued to any nonresident pharmacy pursuant to this section to
25 serve as any evidence that the nonresident pharmacy is doing
26 business within this state." Cal. Bus. & Prof. Code § 4120(d)
27 (emphasis added). While it appears that the primary legislative
28 intent of this subsection was to distinguish between nonresident
pharmacies who conduct intrastate business from those who conduct
interstate business for licensure and taxation purposes,
Governor's Chaptered Bill File for Assembly Bill No. 2025 (1968
Reg. Sess.), Chapter 1463, it is nonetheless serves to further
separate defendant from plaintiff's proffered cases dealing
exclusively with defendants that were found to have explicitly
"registered to do business within" a particular state.

1 Moreover, plaintiff's argument that voluntary
2 compliance with any such state statute requiring registration and
3 appointment of an agent for service therein amounts to
4 substantial contact for jurisdictional purposes does not comport
5 with due process. By registering with an agency of the state, a
6 foreign company "only potentially subjects itself to
7 jurisdiction; it does not subject itself to potential
8 jurisdiction." Leonard v. USA Petroleum Corp., 829 F. Supp. 882,
9 888 (S.D. Tex. 1993); see also id. at 888-89 ("The designation of
10 an agent simply gives the company more efficient notice than
11 [other methods of] service. . . . In complying with the [forum
12 state's] registration statute, [defendant] consented to personal
13 jurisdiction in [the forum state] only if the jurisdiction were
14 constitutional.") (emphasis added). "Registration to do business
15 and appointment of an agent for service of process, especially
16 when done to fulfill state law requirements, . . . do not
17 constitute a general business presence or consent to suit in [the
18 forum state's] courts on every matter." Id. at 889; see also
19 Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir.
20 1992) ("Not only does the mere act of registering an agent not
21 create [defendant's] general business presence in [the forum
22 state], it also does not act as consent to be hauled into [the
23 forum state's] courts on any dispute with any party anywhere
24 concerning any matter.").

25 Consequently, because due process is the cornerstone of
26 personal jurisdiction, this court is not permitted to haul a
27 nonresident company like defendant across state lines on the
28 fiction that it somehow consented to jurisdiction in California.

1 See Leonard, 829 F. Supp. at 889 ("The idea that a foreign
 2 corporation consents to jurisdiction in [the forum state] by
 3 completing a state-required form, without having Contact with
 4 [forum state], is entirely fictional. Due process is central to
 5 consent; it is not waived lightly. A waiver through consent must
 6 be willful, thoughtful, and fair. 'Extorted actual consent' and
 7 'equally unwilling implied consent' are not the stuff of due
 8 process.") (citation omitted); see also Ratliff v. Cooper Labs., Inc.,
 9 444 F.2d 745, 748 (4th Cir. S.C. 1971) ("The principles of
 10 due process require a firmer foundation than mere compliance with
 11 state domestication statutes.").

12 2. General Jurisdiction

13 Under general jurisdiction, a defendant whose contacts
 14 with a state are "substantial" or "continuous and systematic" can
 15 be brought into court in that state in any action, even if the
 16 action is unrelated to those contacts. See Helicopteros
 17 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984).
 18 "This is an exacting standard, as it should be, because a finding
 19 of general jurisdiction permits a defendant to be haled into
 20 court in the forum state to answer for any of its activities
 21 anywhere in the world." Schwarzenegger v. Fred Martin Motor Co.,
 22 374 F.3d 797, 801 (9th Cir. 2004); see also Bancroft & Masters,
 23 Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)
 24 ("The standard for establishing general jurisdiction is 'fairly
 25 high,' and requires that the defendant's contacts be of the sort
 26 that approximate physical presence.") (internal citations
 27 omitted).

28 Here, the court cannot exercise general jurisdiction

1 over defendant because its contacts do not qualify as either
2 substantial or continuous and systematic. It is uncontested that
3 defendant's principal place of business is in Ohio, owns no
4 property in California, owes no taxes in California, and
5 maintains no employees or bank accounts in California. (Hill
6 Decl. ¶¶ 9, 10; Pfister Decl. ¶ 13; Def.'s Reply Mem. in Supp. of
7 Mot. to Dismiss 2:8-10.) Although it has the burden of
8 establishing general jurisdiction, plaintiff has asserted little
9 to this effect, save conclusory assertions that defendant
10 maintains relationships with business partners and nursing
11 agencies in the state. Defendant categorically denies these
12 assertions, and has presented substantial evidence to the
13 contrary. (Hill Decl. ¶ 5; Pfister Decl. ¶ 13); see also
14 Schwarzenegger, 374 F.3d at 800 (finding that "plaintiff cannot
15 'simply rest on the bare allegations of its complaint'" because
16 only "uncontroverted allegations in the complaint must be taken
17 as true.") (citations omitted).

18 Given the paucity of plaintiff's contentions concerning
19 substantial activity between defendant and California, it is
20 apparent that defendant's activities in the forum state "were
21 more occasional than continuous, and more infrequent than
22 systematic." Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1331
23 (9th Cir. 1984). Even assuming that plaintiff could provide
24 evidence that defendant maintained such scarce contacts, it is
25 evident that plaintiff's allegations would still fall well short
26 of demonstrating the "'continuous and systematic' contacts that
27 the Supreme Court and [the Ninth Circuit] have held to constitute
28 sufficient presence' to warrant general jurisdiction."

1 Schwarzenegger, 374 F.3d at 801; see, e.g., Helicopteros
2 Nacionales de Colombia, S.A., 466 U.S. at 416 (no jurisdiction
3 over foreign corporation that sent officer to forum for one
4 negotiating session, accepted checks drawn on a forum bank,
5 purchased equipment from the forum, and sent personnel to the
6 forum to be trained); Cubbage v. Merchant, 744 F.2d 665, 667-68
7 (9th Cir. 1984) (no jurisdiction over doctors despite significant
8 numbers of patients in forum, use of forum's state medical
9 insurance system and telephone directory listing that reached
10 forum); Gates Learjet Corp., 743 F.2d at 1330-31 (no jurisdiction
11 over defendants despite several visits and purchases in forum,
12 solicitation of contract in forum that included choice of law
13 provision favoring forum, and extensive communication with
14 forum); Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240,
15 1243 (9th Cir. 1984) (developing sales force in forum state
16 insufficient); Cornelison v. Chaney, 16 Cal. 3d 143, 149 (1976)
17 (holding that--despite the defendant's activity in California
18 consisting of some twenty trips a year into the state over the
19 past seven years to deliver and obtain goods, an independent
20 contractor relationship with a local broker, and a Public
21 Utilities Commission license--"these contacts are not sufficient
22 to justify the exercise of jurisdiction over defendant without
23 regard to whether plaintiff's cause of action is relevant to
24 California activity").

25 3. Specific Jurisdiction

26 Having concluded both that defendant did not consent to
27 personal jurisdiction and that the court does not have general
28 jurisdiction over defendant, the court next examines plaintiff's

1 allegations through the analytical lens of specific jurisdiction.
2 The following three-part test dictates whether specific
3 jurisdiction can be exercised over defendant:

4 (1) The non-resident defendant must purposefully direct
5 his activities or consummate some transaction with the
6 forum or resident thereof; or perform some act by which
7 he purposefully avails himself of the privilege of
8 conducting activities in the forum, thereby invoking the
9 benefits and protections of its laws;
10 (2) the claim must be one which arises out of or relates
11 to the defendant's forum-related activities; and
12 (3) the exercise of jurisdiction must comport with fair
13 play and substantial justice, i.e. it must be reasonable.

14 Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987) (emphasis
15 added). The plaintiff bears the burden of satisfying the first
16 two prongs of the test. Sher v. Johnson, 911 F.2d 1357, 1361
17 (9th Cir. 1990). If the plaintiff succeeds in satisfying both of
18 the first two prongs, the burden then shifts to the defendant to
19 "present a compelling case" that the exercise of jurisdiction
20 would not be reasonable. Burger King Corp. v. Rudzewicz, 471
21 U.S. 462, 476-78 (1985).

22 a. Purposefully Avail/Direct

23 This prong of the specific jurisdiction test has been
24 further subdivided into two distinct questions: whether BioRx
25 either (1) "purposefully availed" itself of the privilege of
26 conducting activities in the forum, or (2) "purposefully
27 directed" its activities toward the forum. See Schwarzenegger v.
28 Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) ("We
often use the phrase 'purposeful availment,' in shorthand
fashion, to include both purposeful availment and purposeful
direction, but availment and direction are, in fact, two distinct
concepts. A purposeful availment analysis is most often used in

1 suits sounding in contract. A purposeful direction analysis, on
2 the other hand, is most often used in suits sounding in tort.")
3 (internal citations omitted).

4 i. Purposeful Availment Generally

5 A showing that a defendant purposefully availed itself
6 of the privilege of doing business in a forum state typically
7 consists of evidence of the defendant's contacts or actions in
8 the forum. By making such contacts or taking such actions, a
9 defendant "purposefully avails itself of the privilege of
10 conducting activities within the forum State, thus invoking the
11 benefits and protections of its laws." Hanson v. Denckla, 357
12 U.S. 235, 253 (1958). In return for these "benefits and
13 protections," a defendant must "submit to the burdens of
14 litigation in that forum." Burger King, 471 U.S. at 476; see also Cote v. Wadel, 796 F.2d 981, 984 (7th Cir. 1986)
15 ("[P]ersonal jurisdiction over nonresidents of a state is a quid
16 pro quo that consists of the state's extending protection or
17 other services to the nonresident.").

18 With respect to this inquiry, plaintiff merely
19 reiterates the above-addressed argument that defendant
20 purposefully availed itself of the benefits and privileges of
21 California when it registered with the California State Board of
22 Pharmacy and therein appointed an agent for service of process.
23 Because the court has acknowledged that due process does not
24 permit it to haul defendant across state lines simply based upon
25 its compliance with a state statute, the traditional
26 justification for finding purposeful availment thus does not
27 apply. See supra, Section II.A. To the extent that defendant's
28

1 conduct might justify the exercise of personal jurisdiction in
2 California, therefore, such conduct must have been purposefully
3 directed at California.

4 ii. Purposeful Direction

5 In contrast to purposeful availment, a showing that a
6 defendant purposefully directed his conduct toward a forum state
7 usually consists of evidence of the defendant's actions outside
8 the forum state that are directed at the forum, such as the
9 distribution in the forum state of goods originating elsewhere.
10 Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984);
11 see also World-Wide Volkswagen, 444 U.S. at 297-98 (noting that a
12 "forum State does not exceed its powers under the Due Process
13 Clause if it asserts personal jurisdiction over a corporation
14 that delivers its products into the stream of commerce with the
15 expectation that they will be purchased by consumers in the forum
16 State"); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899
17 (9th Cir. 2002) (finding purposeful direction where the defendant
18 distributed its pop music albums from Europe in the forum state).
19 Significantly, due process permits the exercise of personal
20 jurisdiction over a defendant who "purposefully directs" his
21 activities at residents of a forum, even in the "absence of
22 physical contacts" with the forum. Burger King, 471 U.S. at 476
23 (citation omitted).

24 Purposeful direction is evaluated under the three-part
25 "effects" test traceable to the United States Supreme Court's
26 decision in Calder v. Jones, 465 U.S. 783 (1984). Schwarzenegger
27 v. Fred Martin Motor Co., 374 F.3d 797, 803 (9th Cir. Cal. 2004).
28 Under Calder, "the 'effects' test requires that the defendant

1 allegedly have (1) committed an intentional act, (2) expressly
 2 aimed at the forum state, (3) causing harm that the defendant
 3 knows is likely to be suffered in the forum state." Dole Food
 4 Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002). However,
 5 courts in this circuit are warned not to focus too narrowly on
 6 the test's third prong--the effects prong--holding that
 7 "something more" is needed in addition to a mere foreseeable
 8 effect. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir.
 9 2006). In other words, courts must recognize that the "effects"
 10 test cannot stand for the broad proposition that a foreign act
 11 with foreseeable effects in the forum state will always give rise
 12 to specific jurisdiction, but rather must demonstrate "something
 13 more"--i.e., "what the Supreme Court described as 'express
 14 aiming' at the forum state." Id. (citation omitted). Thus, the
 15 pertinent inquiry here is whether defendant's conduct was
 16 expressly aimed at California.

17 Obligated only to present a prima facie case, see Data
 18 Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th
 19 Cir. Cal. 1977) ("Any greater burden . . . would permit a
 20 defendant to obtain a dismissal simply by controverting the facts
 21 established by a plaintiff."), plaintiff sufficiently alleges
 22 that defendant acted intentionally in selecting the "NutriThrive"
 23 mark to promote its TPN-related product line with full knowledge
 24 of plaintiff and its "Nutrishare" mark. See Dole Foods Co., 303
 25 F.3d at 1111 ("Because [the plaintiff] has sufficiently alleged
 26 that [the defendants] acted intentionally, we skip to the
 27 'express aiming' requirement.").

28 Plaintiff contends that at least three grounds exist

1 whereby defendant's conduct satisfies the "expressly aimed"
2 requirement, which is met when the defendant is alleged to have
3 engaged in conduct targeted at a plaintiff whom the defendant
4 knows to be a resident of the forum state. Id. Specifically,
5 plaintiff asserts that defendant maintains an interactive website
6 that reaches out to California residents, actively solicits new
7 California customers, and has ongoing commercial relationships
8 with California customers.

9 Whether defendant's maintenance of its website
10 constitutes purposeful direction necessitates application of the
11 "sliding scale" approach approved by the Ninth Circuit in
12 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).
13 See id. at 419 (adopting the test originated by the district
14 court in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119
15 (W.D. Pa. 1997)). Under the sliding scale approach, "the
16 likelihood [that] personal jurisdiction can be constitutionally
17 exercised is directly proportionate to the nature and quality of
18 commercial activity that an entity conducts over the Internet."
19 Zippo Mfg. Co., 952 F. Supp. at 1124.

20 At one end of this sliding scale, the defendant
21 conducts online business transactions over the Internet with
22 residents of the forum. Id. "In such situations, jurisdiction
23 is almost always proper" because the defendant has asserted
24 itself "into the forum and made actual contact, often commercial,
25 with a forum resident." Callaway Golf Corp. v. Royal Canadian
26 Golf Ass'n, 125 F. Supp. 2d 1194, 1202 (C.D. Cal. 2000) (citation
27 omitted). At the other end of the scale are "passive" websites,
28 through which the defendant simply posts information to those who

1 access the site, such as advertisements and informational pieces
2 about the website's host. Id.; see id. ("A passive Web site that
3 does little more than make information available to those who are
4 interested in it is not grounds for the exercise of personal
5 jurisdiction.") (citation omitted). In the middle of the sliding
6 scale are "interactive" websites that, for example, allow the
7 user to exchange information with the defendant host site. Zippo
8 Mfg. Co., 952 F. Supp. at 1124. With respect to "interactive"
9 websites, courts must examine "the level of interactivity and
10 commercial nature of the exchange of information that occurs on
11 the Web site" to determine if the defendant has purposefully
12 availed itself of the forum to make the exercise of jurisdiction
13 comport with traditional notions of fair play and substantial
14 justice. Cybersell, 130 F.3d at 420 (citing Zippo Mfg. Co., 952
15 F. Supp. at 1124).

16 Here, defendant's website falls somewhere in the
17 middle, with certain features implicating both the passive and
18 business transaction ends of the sliding scale continuum.
19 Specifically, the website serves predominantly as a large-scale,
20 static advertisement for defendant's products and/or services,
21 and defendant does not conduct instant online transactions by
22 allowing prospective browsers to purchase "NutriThrive" supplies
23 and/or services directly over the Internet. The website does,
24 however, present prospective browsers with a series of
25 interactive functions that elevate it beyond the scope of an
26 archetype "passive" website, including a "discussion board" in
27 which any user can post messages or chat on-line with one of one
28 of defendant's "consumer advocates"-- i.e., employees who are

1 also consumers of "NutriThrive" products and/or services (Okamoto
2 Decl., Ex. B.); a "Referral" section where any browser can sign
3 up to become a "NutriThrive consumer" or refer a patient to
4 become a "NutriThrive consumer" (Id.); and a "Contact Us" email
5 interface page that gives prospective browsers the ability to
6 request further information online regarding defendant's supplies
7 and/or services. (Id. at Ex. A.) Thus, while defendant's
8 website does not possess many of the characteristics of websites
9 that are undeniably sufficient to demonstrate purposeful
10 direction at the forum state, it nonetheless could qualify as an
11 interactive website because "even a cursory glance at the
12 [website] clearly illustrates that the site mainly serves to
13 advertise and promote sales of the [defendant's] service."

14 WebZero, LLC v. ClicVU, Inc., No. 08-0504, 2008 WL 1734702, at *6
15 (C.D. Cal. Apr. 4, 2008); see also id. ("Despite the absence of
16 [explicit means of business transactions], the Court finds that
17 the site is fundamentally a commercial website because it
18 purports to offer and provide services to visitors."); cf.
19 RubberCraft Corp. of Cal. v. RubberCraft, Inc., No. 97-4070, 1997
20 WL 835442, at *3 (C.D. Cal. Dec. 17, 1997) (finding purposeful
21 availment/direction based partially on the fact that defendant's
22 used national advertising, maintained an 800 number, and operated
23 a web-page that advertised defendant's product and gathered
24 customer information).

25 Although the website demonstrates a significant level
26 of interactivity, defendant's stand-alone maintenance of it does
27 not conclusively constitute purposeful direction. See Cybersell,
28 130 F.3d at 419-20 (declining to exercise personal jurisdiction

1 over a defendant whose website allowed users to list their
2 addresses with the site, indicate an interest in the defendant's
3 services, and view advertisements and other information posted on
4 the site). However, plaintiff has sufficiently alleged
5 additional conduct directly targeting California--thus satisfying
6 the requirement of "something more." See Rio Props. v. Rio Int'l
7 Interlink, 284 F.3d 1007, 1020 (9th Cir. 2002) ("While
8 [defendant's] assertion [that it operates only a passive website]
9 may be true, operating even a passive website in conjunction with
10 'something more'--conduct directly targeting the forum--is
11 sufficient to confer personal jurisdiction."). Specifically,
12 defendant's website explicitly targets California consumers with
13 an announcement in the "NEWS AND EVENTS" section--prominently
14 displayed as the centerpiece of defendant's "NutriThrive"
15 homepage--that it will be attending the 2008 Oley Conference held
16 in San Diego, California between June 26 and June 29, 2008.³
17 (Okamoto Decl. Ex. B.) Because the majority of the Oley
18 Conference attendees are local home infusion customers that
19

20 ³ Plaintiff also argues that defendant's subsequent
21 participation in the June 26-29 Oley Conference constitutes
22 further evidence of purposeful availment/direction for purposes
23 of the jurisdictional analysis. (Okamoto Decl. ¶ 7-12.) Because
24 the Oley Conference took place after plaintiff filed its
Complaint on June 4, 2008, however, the court cannot consider
25 allegations stemming directly from defendant's actual
participation in the event. See Farmers Ins. Exch. v. Portage La
26 Prairie Mut. Ins. Co., 907 F.2d 911, 913 (9th Cir. 1990) ("Only
27 contacts occurring prior to the event causing the litigation may
be considered."); see also Klinghoffer v. S.N.C. Achille Lauro Ed
Altri-Gestione, 937 F.2d 44, 52 (2d Cir. 1991) (refusing to
recognize post-filing allegations for jurisdictional purposes
"because personal jurisdiction depends on the defendant's
contacts with the forum state at the time the lawsuit was
filed."); accord McFarlane v. Esquire Magazine, 74 F.3d 1296,
1301 (D.C. Cir. 1996).

1 benefit from TPN-related products and services, this
 2 California-based conference serves as a crucial marketing
 3 exhibition for national home infusion companies such as the
 4 parties to this lawsuit. (Okamoto Decl. ¶ 7.) Thus, it is fair
 5 to say that "[t]he website's content suggests that [defendant]
 6 was looking to attract [customers] in California" insofar as it
 7 "targeted specific markets including California." In-N-Out
Burgers v. Basso, No. 05-1231, 2005 WL 5337562, at *2 (C.D. Cal.
 8 June 27, 2005); see id. ("[B]ecause the defendant deliberately
 9 directed its advertising and solicitation efforts toward
 10 California residents, the purposeful availment prong is
 11 satisfied."); Ind. Plumbing Supply, Inc. v. Standard of Lynn,
Inc., 880 F. Supp. 743, 747 n.2 (C.D. Cal. 1995) (finding that,
 12 given the California-based features apparent in its national
 13 advertisement, "the defendant could reasonably anticipate that it
 14 would receive some interest from California customers").

17 Defendant's alleged conduct constituting "something
 18 more" is also evinced by its concession that it maintains
 19 commercial relationships with two Southern California-based
 20 "NutriThrive" customers.⁴ See id. at 747 (holding that the
 21

22 ⁴ Defendant contends that both of its California-based
 23 customers use "NutriThrive" products for enteral purposes only--a
 24 method of nutrient delivery where fluid is given directly into
 25 the gastrointestinal tract--and thus do not compete with
 26 plaintiff's TPN-related services. This argument fails on two
 27 grounds. First, plaintiff asserts that it also provides
 28 competing enteral products and services to its TPN-customers
 under its "Nutrishare" mark. (Okamoto Decl. ¶ 14.) Second,
 because both enteral and TPN products and services relate to
 digestive/ gastrointestinal complications, the two methods share a
 close proximity to one another and could reasonably implicate
 customer confusion. See Entrepreneur Media v. Smith, 279 F.3d
 1135, 1147 (9th Cir. 2002) ("Related goods are those products

1 plaintiff demonstrated "something more" in order to base
2 jurisdiction in California when, in addition to its generic
3 national marketing campaign that was alleged to have infringed
4 plaintiff's trademark, "Defendant has also made two California
5 sales since the challenged advertisements began running.").
6 Moreover, plaintiff has submitted a declaration from a Southern
7 Californian resident who contacted defendant via the toll-free
8 number listed on its website. (Bundy Decl. ¶ 3.) After simply
9 inquiring whether defendant offered its services in California,
10 defendant's head TPN pharmacist purportedly offered to send one
11 of defendant's nurses to California to assist the declarant with
12 her TPN setup.⁵ (Id.) Subsequently, the declarant asserts that
13 defendant sent her a "start-up" packet, including a binder
14 containing "NutriThrive" promotional materials and a business

15 which would be reasonably thought by the buying public to come
16 from the same source if sold under the same mark.").

17 ⁵ Defendant has objected to admission of Ms. Bundy's
18 conversation with defendant's head TPN pharmacist on grounds of
19 hearsay, lack of foundation, and lack of personal knowledge.
20 (Def.'s Objections to Evid. # 11.) Ms. Bundy's declaration,
21 however, sufficiently establishes personal knowledge and
22 foundation where it provides that Ms. Bundy placed the phone
23 calls herself, the date she placed the calls, and the number she
24 dialed. Fed. R. Evid. 104, 602. Additionally, statements from
25 defendant's head TPN pharmacist are not hearsay because
26 communications made by defendant's employees constitute party
27 admissions. Id. 801(d)(2).

28 Overall, defendant raised fifteen evidentiary
objections to plaintiff's opposition and supporting materials,
made primarily on the grounds that the statements and/or
materials at issue constitute inadmissible personal opinions or
hearsay, lack personal knowledge, and/or are irrelevant. The
court finds that the majority of these objections, made as usual
after the other side has no realistic opportunity before the
hearing to cure the alleged defects, are spurious and thereby
immaterial to the court's analysis of the motions. To the extent
that any objected-to-evidence is relevant and relied on by the
court herein, the court overrules any asserted objections to that
evidence.

1 card. (Id.); see W. Corp. v. Superior Court, 116 Cal. App. 4th
2 1167, 1176 (2004) (finding that marketer who "upsells" by
3 offering additional products or services to customer who
4 initially contacts marketer, knowing that customer is California
5 resident, avails itself of California for business even though
6 customer placed initial call).

7 Consequently, because plaintiff sufficiently alleges
8 that defendant's operation of an interactive website--
9 supplemented by its direct marketing toward California and
10 ongoing relationships with California-based consumers--has caused
11 plaintiff harm in the state of its "principal place of business,"
12 Excel Plas, Inc. v. Sigmax Co., Ltd., No. 07-0578, 2007 WL
13 2853932, at *6 (S.D. Cal. Sept. 27, 2007), defendant has
14 purposefully availed/directed itself to jurisdiction in
15 California. See Tech Heads, Inc. v. Desktop Serv. Ctr., 105 F.
16 Supp. 2d 1142, 1151 (D. Or. 2000) (holding that defendant
17 "intentionally availed itself of jurisdiction" by "posting a
18 highly commercial, highly interactive Web site on the World Wide
19 Web, engaging in Internet commerce with at least one [forum
20 state] resident, advertising in a national newspaper"); Stomp,
21 Inc. v. Neato L.L.C., 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999)
22 (finding that, by advertising its products for over the Internet,
23 the defendant purposefully availed itself of the forum state,
24 even though only two sales had been consummated with forum
25 residents).

26 b. Claims Arising Out of/Related to Defendant's
27 Forum-Related Activities

28 The second requirement for specific jurisdiction is

1 that the claims asserted in the litigation arise out of a
2 defendant's forum related activities. Panavision Int'l, L.P. v.
3 Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998). To determine
4 whether a plaintiff's claims arise out of forum-related
5 activities, courts apply a "but for" test--i.e., but for the
6 defendant's forum-related activities through which it
7 purposefully avails itself of the forum, the plaintiff would not
8 have suffered injury. Doe v. Unocal Corp., 248 F.3d 915, 925
9 (9th Cir. 2001).

10 Here, because the purported injuries that led plaintiff
11 to assert its trademark and unfair competition claims against
12 defendant arise directly from defendant's allegedly infringing
13 conduct in California, plaintiff has similarly satisfied the
14 second requirement for specific jurisdiction. See Rio Props. v.
15 Rio Int'l Interlink, 284 F.3d 1007, 1021 (9th Cir. 2002) ("[T]his
16 requirement was satisfied where [defendant's misappropriation] of
17 [plaintiff's] trademark had the effect of injuring [plaintiff] in
18 California, its home state."); Dole Food Co. v. Watts, 303 F.3d
19 1104, 1114 (9th Cir. 2002) ("It is obvious that [plaintiff's]
20 claims against [defendants] arise directly out of their contacts
21 with the forum [where] the contacts between [defendants] and the
22 forum state are integral and essential parts of the alleged
23 fraudulent scheme on which [plaintiff] bases its suit.");
24 WebZero, L.L.C. v. ClicVU, Inc., No. 08-0504, 2008 WL 1734702, at
25 *7 (C.D. Cal. Apr. 4, 2008) ("[I]t is plainly evident that
26 [plaintiff's] patent infringement suit directly relates to
27 ClivVU's allegedly infringing services . . . in California.").

28 c. Reasonableness of Exercising Jurisdiction

Because plaintiff has succeeded in satisfying both of the first two prongs in the specific jurisdiction analysis, defendant now has the burden of convincing the court that jurisdiction is nonetheless unreasonable. See Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995) ("To avoid jurisdiction, [the defendant] must 'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985))). The Ninth Circuit has articulated the following seven factors to determine whether the exercise of jurisdiction over a non-resident defendant comports with fair play and substantial justice, none of which is dispositive:

(1) the extent of the [defendant's] purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the [defendant's] state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

i. Defendant's Purposeful Interjection

A district court must usually begin by considering the extent to which the defendant, by its alleged activities, purposefully interjected itself into the forum. *Id.* at 1488. As defendant acknowledges, however, because the Ninth Circuit has found that “[t]he factor of purposeful interjection is analogous to the purposeful direction analysis” discussed above, this factor does not weigh against jurisdiction where the court has

1 already determined that defendant purposefully directed its
2 activities at the forum state. Sinatra v. Nat'l Enquirer, Inc.,
3 854 F.2d 1191, 1199 (9th Cir. 1988); see also Roth v. Garcia
4 Marquez, 942 F.2d 617, 623 (9th Cir. 1991) (finding that "[i]n
5 light of the first prong of purposeful availment, analysis of
6 this first factor in the third prong would be redundant" and thus
7 "there is no need to analyze this first factor separately");
8 Corp. Inv. Bus. Brokers v. Melcher, 824 F.2d 786, 790 (9th Cir.
9 1987) ("Ninth Circuit cases give the 'purposeful interjection'
10 factor no weight once it is shown that the defendant purposefully
11 directed its activities to the forum state").

ii. Defendant's Burden of Litigating in California

The court must also consider the burden that litigating in the forum state places on the nonresident defendant. Callaway Golf Corp. v. Royal Canadian Golf Ass'n, 125 F. Supp. 2d 1194, 1205 (C.D. Cal. 2000). While acknowledging that defendant, whose principal place of business is in Ohio, would be inconvenienced by having to defend itself in California, "with the advances in transportation and telecommunications and the increasing interstate practice of law, any burden is substantially less than in days past."⁶ Menken v. Emm, 503 F.3d 1050, 1060 (9th Cir. 2007); see also Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128-29 (9th Cir. 1995) (noting that unless the

⁶ In fact, the court takes judicial notice of the fact
26 that defendant's counsel is headquartered in San Diego,
27 California. See Fed. R. Evid. 201 (allowing courts to take
28 judicial notice of matters that are "capable of accurate and
ready determination by resort to sources whose accuracy cannot
reasonably be questioned").

1 "inconvenience is so great as to constitute a deprivation of due
 2 process, it will not overcome clear justifications for the
 3 exercise of jurisdiction.") (citation omitted). Thus, any weight
 4 gleaned from this factor in defendant's favor is negligible.

5 iii. Sovereignty Interests

6 Both parties agree that, to the extent the court must
 7 consider whether the exercise of jurisdiction in California would
 8 conflict with the sovereignty interests of defendant's
 9 alternative forum of Ohio, Panavision Int'l, L.P. v. Toeppen, 141
 10 F.3d 1316, 1323 (9th Cir. 1998), this factor is inapplicable
 11 "because there is no conflict between the sovereignty of Ohio
 12 and California." (Pl.'s Opp'n to Def.'s Mot. to Dismiss
 13 23:12-13; Def.'s Reply in Supp. of Mot. to Dismiss 15:3-5.)

14 iv. State's Interest

15 Because "California maintains a strong interest in
 16 providing an effective means of redress for its residents [who
 17 are] tortiously injured," Core-Vent Corp. v. Nobel Indus. AB, 11
 18 F.3d 1482, 1489 (9th Cir. 1993) (internal citations omitted),
 19 this factor weighs in plaintiff's favor. See Dole Food Co. v.
 20 Watts, 303 F.3d 1104, 1116 (9th Cir. 2002) ("Since [plaintiff's]
 21 principal place of business is California, this factor favors
 22 plaintiff."); accord Panavision Int'l, L.P., 141 F.3d at 1323.

23 v. Efficiency of the Forum

24 The "efficiency of the forum" factor focuses on "where
 25 the witnesses and the evidence are likely to be located."
 26 Core-Vent Corp., 11 F.3d at 1489. The court recognizes that
 27 witnesses will presumably come from both California and Ohio, but
 28 the majority of witnesses, as well as evidence related to

defendant's infringing conduct, appear to be located in California. Thus, this factor also weighs in favor of plaintiff.

vi. Convenience and Effectiveness of Relief for Plaintiff

"Although the importance of the forum to the plaintiff nominally remains part of this test, cases have cast doubt on its significance." Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 129 (9th Cir. 1995) (citing Core-Vent Corp., 11 F.3d at 1490). As the Ninth Circuit has previously stated, "[n]o doctorate in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's preference." Roth v. Garcia Marquez, 942 F.2d 617, 624 (9th Cir. 1991); see also Dole Food Co., Inc., 303 F.3d at 1116 ("[I]n this circuit, the plaintiff's convenience is not of paramount importance."). Consequently, this factor does not significantly influence the court's analysis.

vii. Availability of an Alternative Forum

Plaintiff fails to demonstrate that an alternative forum, presumably Ohio, is either unavailable or unable to effectively adjudicate the instant dispute. Defendant has not, however, identified a "regulatory or policy interest[that would be] served by the exercise of jurisdiction in [the alternative forum], making it unlikely that [the alternative forum] possesses a strong interest in providing a forum to resolve this suit."

1 In balancing the reasonableness factors, the court
2 concludes that defendant has failed to present a compelling case
3 that the exercise of jurisdiction in California would be
4 unreasonable. See Caruth, 59 F.3d at 128 ("Since [defendant]
5 purposefully availed itself of the forum state, we begin with a
6 presumption of reasonableness which can only be overcome by a
7 'compelling case that the presence of some other considerations
8 would render jurisdiction unreasonable.'") (citation omitted).
9 Accordingly, because plaintiff's claims arise from defendant's
10 purposefully directed, forum-related conduct, the court will deny
11 defendant's motion to dismiss for lack of personal jurisdiction.

12 B. Motion to Dismiss for Improper Venue or, Alternatively,
13 Motion to Transfer Venue

14 Defendant next argues that, even if susceptible to
15 personal jurisdiction in California, plaintiff's assertion of
16 venue in this district is nonetheless improper and the court
17 should dismiss the action or, alternatively, transfer it to the
18 Southern District of California pursuant to 28 U.S.C. § 1406(a).
19 Under § 1406(a), if an action is filed in the wrong district, the
20 court must, upon timely motion, dismiss the action or, if it be
21 in the interest of justice, order transfer to any district where
22 the "action could have been brought." 28 U.S.C. § 1406(a); see
23 also Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d
24 1174, 1181 (9th Cir. 2004) ("A defendant over whom personal
25 jurisdiction exists but for whom venue is improper may move for
26 dismissal or transfer for improper venue under 28 U.S.C. §
27 1406(a)."). When venue is challenged under § 1406(a), the
28 plaintiff bears the burden of establishing that venue is in the

proper forum. See Airola v. King, 505 F. Supp. 30, 31 (D. Az. 1980); see also Hope v. Otis Elevator Co., 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005) ("Plaintiff has the burden of proving that venue is proper in the district in which the suit was initiated.").

Venue in federal Lanham Act cases is governed by the general venue statute, 28 U.S.C. § 1391(b), which states that venue is proper in a judicial district (1) in which any defendant resides, if all defendants reside in the same state; (2) in which a substantial part of the events or omissions giving rise to the claim occurred; or (3) in which any defendant may be found, if there is no other district in which the action may be brought. Id. § 1391(b)(1)-(3). "[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Id. § 1391(c). However, "this does not mean that venue is proper in any district where defendant could be subjected to service." Johnson Creative Arts v. Wool Masters, 743 F.2d 947, 950 (1st Cir. 1984). Rather, in states like California that have more than one judicial district, "such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." 28 U.S.C. § 1391(c). "This effectively turns the venue question into a personal jurisdiction analysis, treating the Eastern District of California as a state." Honor Plastic Indus. v. Lollicup USA, Inc., No. 06-0707, 2006 WL 2792812, at *5 (E.D. Cal. Sept. 26, 2006).

Given § 1391(c)'s express instruction, plaintiff must satisfy its burden by demonstrating the existence of substantial contacts or purposeful avialment/direction by which defendant has subjected itself to personal jurisdiction in the Eastern District of California.⁷ Plaintiff's "demonstration" of such contacts and/or conduct is limited to its conclusory assertions that personal jurisdiction exists in this district because (1) defendant has registered with the California State Board of Pharmacy in Sacramento and appointed an agent for service of process, and (2) a woman named "Jessi" from Redding, California purportedly posted an online message indicating that she had engaged in discussions with defendant about possible treatment.

First, as thoroughly addressed above, see supra, Section II.A.1, substantial due process concerns prevent the exercise of personal jurisdiction over defendant based solely on compliance with a state statute such as the one at issue here--particularly when registration and agent designation took place in Sacramento purely because Sacramento, as the State capital, is

⁷ In the event the court remained unconvinced as to the propriety of either personal jurisdiction or venue after its consideration of plaintiff's evidence and arguments, plaintiff had initially requested a continuance for additional discovery related solely to jurisdiction and/or venue. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss 27:10-12); see also Bulldog W. Equip. v. Mapcon, Inc., No. 06-2183, 2007 WL 973970, at *8 (D. Ariz. Mar. 30, 2007) ("[U]pon a request to permit discovery or an evidentiary hearing on a matter of personal jurisdiction, 'the trial court is vested with broad discretion [to deny such request] and will not be reversed except upon the clearest of showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.'" (quoting Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977))). During subsequent oral argument on the instant motions, however, plaintiff's counsel explicitly withdrew this request and instead elected to have the court decide the matter based on the already-submitted materials.

1 home to the California State Board of Pharmacy. See, e.g.,
2 Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971)
3 ("The principles of due process require a firmer foundation than
4 mere compliance with state domestication statutes.").

5 Second, plaintiff has failed to present the court with
6 a declaration from, or any actual relevant evidence ascertaining
7 the identity or whereabouts of, "Jessi." Instead, plaintiff
8 offers nothing more than a printout of an online bulletin board
9 from a third-party website (www.parent-2-parent.com) on which
10 several thousand users have posted messages, one of which is
11 submitted under the username "Jessi" and indicates that this user
12 has been in contact with defendant.⁸ (Okamoto Decl. Ex. D); cf.
13 Earth Prods., Inc. v. Meynard Designs, Inc., No. 05-1326, 2006 WL
14 2192124, at *2 (W.D. Wash. July 31, 2006) (finding that venue in
15 the district was improper where the defendant's letter to a
16 retailer in the district "constitutes the only evidence regarding
17 [defendant's] use of the allegedly infringing trademark in [the
18 district]"). Defendant categorically denies plaintiff's
19 assertions that it has initiated contact and/or entered into
20 commercial relationships with any prospective customers in this
21 district, including "Jessi." (Rielly Decl. ¶ 13; Pfister Decl. ¶
22 8.) Defendant further reasserts under the penalty of perjury
23 that it only has had three California-based customers in its

24
25 ⁸ Even if the court was inclined to bestow any weight to
26 "Jessi's" purported bulletin board posting, such evidence must be
27 rejected on hearsay grounds because plaintiff is offering the
28 online statement for the truth of the matter asserted--i.e., that
"Jessi" had been in contact with defendant. See Fed. R. of Evid.
801(c) ("'Hearsay' is a statement, other than one made by the
declarant while testifying at the trial or hearing, offered in
evidence to prove the truth of the matter asserted.").

1 existence, all of whom are based in Southern California and only
2 two of which use "NutriThrive" products. (Rielly Decl. ¶ 13);
3 see also Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,
4 800 (9th Cir. 2004) (finding that "plaintiff cannot 'simply rest
5 on [] bare allegations'"') (citation omitted); Jaliwa v. Concerned
6 Citizens of S. Cent. L.A., No. 06-2617, 2007 WL 2021818, at *4
7 (S.D. Cal. July 10, 2007) ("[Plaintiff's] bare assertion of
8 belief that [defendant] resides in this district is insufficient
9 to satisfy Plaintiff's burden of establishing that [defendant]
10 resides in this district.").

11 Consequently, because it is "essentially uncontroverted
12 that defendant's business contacts with the [Eastern] District
13 have been extremely limited" (general jurisdiction) and "there
14 have been minimal, if any, 'events or omissions' by defendant in
15 the [Eastern] District giving rise to plaintiff's claims"
16 (specific jurisdiction), the Eastern District--as a hypothetical
17 separate state--could not exercise personal jurisdiction over
18 defendant and thus plaintiff has failed to demonstrate that venue
19 is proper in this district. Jamba Juice Co. v. Jamba Group, No.
20 01-4846, 2002 WL 1034040, at *2-3 (N.D. Cal. May 15, 2002); see
21 also Kelly v. Qualitest Pharm., Inc., No. 06-0116, 2006 WL
22 2536627, at *11 (E.D. Cal. Aug. 31, 2006) (finding that, because
23 "[t]he burden was on Plaintiff to show that venue was proper" and
24 "the allegations indicate [only] attenuated conduct by
25 Defendant," "Plaintiff has failed to meet her burden of showing
26 that venue is proper in the Eastern District of California");
27 Injen Tech. Co. Ltd. v. Advanced Engine Mgmt., 270 F. Supp. 2d
28 1189, 1196 (S.D. Cal. 2003) (holding that because defendant did

1 not sell infringing products in the Southern District of
2 California, "the Court concludes that if the Southern District of
3 California were a separate forum state, the defendant's contacts
4 with the district would be insufficient to justify the Court's
5 exercise of specific jurisdiction"); Jamba Juice Co., 2002 WL
6 1034040, at *3 (finding that plaintiff failed to demonstrate
7 proper venue in the Northern District of California where the
8 only evidence submitted to supplement plaintiff's bare
9 allegations showed that "defendant had no clients in northern
10 California in its client database[, d]efendant does not advertise
11 in the yellow pages in the Northern District[, d]efendant does no
12 direct advertising in northern California, nor does defendant
13 send any advertising mailers, brochures or letters into northern
14 California. . . . Defendant, in short, does not direct any
15 business activities at the Northern District, nor profit from any
16 business activities in this district").

17 Because plaintiff has failed to meet its burden, the
18 court, in the interests of justice, will exercise its discretion
19 to transfer the action under 28 U.S.C. § 1406(a) to a venue that
20 is appropriate. See Shell v. Shell Oil Co., 165 F. Supp. 2d
21 1096, 1103 (C.D. Cal. 2001) (noting that, under § 1406(a), "[i]f
22 a plaintiff commences an action in a district in which venue is
23 not proper," "[t]he court has some discretion in choosing between
24 [dismissing or transferring], though generally it is preferred to
25 transfer the case rather than dismissing it altogether"). "If
26 the Court's decision is to transfer, rather than dismiss, the
27 transfer shall be made pursuant to a proper determination of
28 venue pursuant to 28 U.S.C. § 1391[(b)]." Da Cruz v. Princess

1 Cruise Lines, Inc., No. 00-0867, 2000 WL 1585695, at *2 (N.D.
2 Cal. Oct. 12, 2000).

3 Defendant has requested transfer under § 1406(a) to the
4 Southern District of California, and the court agrees that this
5 venue is proper under § 1391(b) because a "substantial part of
6 the events or omissions giving rise to the claim occurred" in San
7 Diego particularly and Southern California generally. 28 U.S.C.
8 § 1391(b)(2). Specifically, the "passing off" of defendant's
9 allegedly infringing trademark would have occurred in the context
10 of defendant's sales of its "NutriThrive" products and/or
11 services to its California customers, all of whom are located in
12 Southern California. See Vanity Fair Mills v. T. Eaton Co., 234
13 F.2d 633, 639 (2d Cir. 1956) ("[I]n cases of trade-mark
14 infringement and unfair competition, the wrong takes place . . .
15 where the passing off occurs, i.e., where the deceived customer
16 buys the defendant's product in the belief that he is buying the
17 plaintiff's [product]."); see also Woodke v. Dahm, 70 F.3d 983,
18 985 (8th Cir. 1995) ("The place where the alleged passing off
19 occurred . . . provides an obviously correct venue.").

20 Additionally, defendant's advertisement announcing its
21 upcoming presence at San Diego's Oley Conference--prominently
22 featured on defendant's website as an opportunity for local
23 attendees to meet and associate with "NutriThrive"
24 representatives--also implicates the very events and
25 circumstances giving rise to plaintiff's instant claims. Chiu v.
26 Mann, No. 02-4590, 2003 WL 716247, at *3 (N.D. Cal. Feb. 24,
27 2003) ("Venue is also improper in the Northern District of
28 California, because the events giving rise to plaintiff's claims

1 occurred . . . within the Central District of California.").
2 Finally, although plaintiff has submitted a declaration from
3 Kathryn Bundy stating that defendant's solicited her and therein
4 sent her a catalog of its services, it is nonetheless undisputed
5 that Ms. Bundy also resides in Southern California. (Bundy Decl.
6 ¶ 1.)

7 Accordingly, because the interests of justice favor the
8 intrastate transfer of this action to a proper venue pursuant to
9 § 1406(a) as opposed to plenary dismissal, the court will deny
10 defendant's motion to dismiss but grant defendant's motion to
11 transfer to the Southern District of California. See, e.g.,
12 Jaliwa v. Concerned Citizens of S. Cent. L.A., No. 06-2617, 2007
13 WL 2021818, at *4 (S.D. Cal. July 10, 2007) (transferring case
14 from the Southern District of California pursuant to § 1406(a)
15 based on plaintiff's failure to establish proper venue and
16 because "[t]his action could have been, and should have been,
17 brought in the Central District of California . . . where the
18 events that are the subject of this Complaint took place"); Injen
19 Tech. Co. Ltd. v. Advanced Engine Mgmt., 270 F. Supp. 2d 1189,
20 1195 (S.D. Cal. 2003) (transferring infringement case where
21 "Defendant [] does not 'reside' in the Southern District of
22 California for purposes of 28 U.S.C. § 1331(c) and, therefore,
23 venue in this district is improper[; v]enue, however, clearly is
24 proper in the Central District of California"); Jamba Juice Co.
25 v. Jamba Group, No. 01-4846, 2002 WL 1034040, at *3 (N.D. Cal.
26 May 15, 2002) (transferring action from the Northern District of
27 California pursuant to § 1406(a) after a finding of improper
28 venue because "[v]enue is undoubtedly proper in the Central

1 District of California"); Da Cruz v. Princess Cruise Lines, Inc.,
2 No. 00-0867, 2000 WL 1585695, at *5 (N.D. Cal. Oct. 12, 2000)
3 (exercising discretion under § 1406(a) to transfer the case from
4 Northern District of California, where venue was deemed improper,
5 because "it appears to this Court that venue properly lies in the
6 Central District of California, since defendant could be said to
7 'reside' there in accordance with the test for general personal
8 jurisdiction described above").

9 IT IS THEREFORE ORDERED that:

10 (1) defendant's motion to dismiss plaintiff's Complaint
11 for lack of personal jurisdiction be, and the same hereby is,
12 DENIED; and

13 (2) defendant's motion to transfer based on improper
14 venue be, and the same hereby is, GRANTED.

15 Pursuant to the provisions of 28 U.S.C. § 1406(a), this
16 case is hereby ordered TRANSFERRED to the United States District
17 Court for the Southern District of California for all further
18 proceedings.

19 DATED: August 14, 2008

20 
21 WILLIAM B. SHUBB

22 UNITED STATES DISTRICT JUDGE

23

24

25

26

27

28